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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. [redacted] 14

INTERSTATE COMMERCE COMMISSION, *Petitioner*

v.

ATLANTIC COAST LINE R. CO., ILLINOIS CENTRAL R. CO., CHICAGO & EASTERN ILLINOIS R. CO., THE BALTIMORE & OHIO R. CO., CHICAGO, BURLINGTON & QUINCY R. CO., CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC R. CO., GULF, MOBILE & OHIO R. CO., THE NEW YORK CENTRAL R. CO., WABASH RAILROAD CO., *Respondents*

BRIEF OF THE NATIONAL INDUSTRIAL TRAFFIC LEAGUE AS AMICUS CURIAE IN SUPPORT OF THE GRANT OF THE PETITION OF THE INTERSTATE COMMERCE COMMISSION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Under date of October 20, 1964, the Interstate Commerce Commission filed a petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit entered July 8, 1964 in *I.C.C.* v. *Atlantic Coast Line R. Co.*, 334 F. 2d

46. The judgment affirmed the judgment of the United States District Court for the Middle District of Florida, entered January 9, 1963, in *Atlantic Coast Line Railroad Co.* v. *United States,* 213 F. Supp. 19 (1963). The text of both of said decisions is set forth in the Appendix to the I.C.C. petition. The National Industrial Traffic League files this brief as amicus curiae in support of the granting of the foregoing petition of the Interstate Commerce Commission herein.

INTEREST OF THE NATIONAL INDUSTRIAL TRAFFIC LEAGUE IN THE ISSUES HERE INVOLVED

The National Industrial Traffic League (hereinafter sometimes referred to as the League) is a voluntary organization of shippers and associations of shippers throughout the United States. The League's members account for a very substantial portion of the traffic transported annually by railroads and other modes of transportation throughout the United States. The League's membership runs the entire gamut of the American shipping public, including large numbers of small and medium size industrial and commercial companies. The members of the League as shippers pay and bear the freight rates and charges of the railroads they employ in providing transportation service.

Unless reversed, the decision and judgment of the Court below will produce a drastic and disadvantageous change in the procedure whereby shippers—and particularly smaller-sized shippers—may obtain reparations when the railroads have exacted unlawful freight rates and charges for transportation service. In practical effect, obdurate and litigious railroads, under the decision of the Court below, will be in a position to deny many shippers, especially smaller-sized

shippers, any effective remedy for reparations for the exaction of unlawful freight rates and charges.

The League, pursuant to permission of the Fifth Circuit, filed a brief as *amicus curiae* with the court below. Consents to the filing by the League of this brief as *amicus curiae,* executed by counsel for the various parties, are being filed simultaneously with this brief.

The League adopts as its own the representations of the I.C.C. in its petition as to Jurisdiction (page 2), Questions Presented (page 2), Statutes Involved (page 3) and Statement Of The Case (pages 3 to 5). The League also adopts the I.C.C. representations as to Reasons For Granting The Writ (pages 5 to 14), but desires as *amicus curiae* to supplement the latter as set forth below.

ARGUMENT

The National Industrial Traffic League submits (1) that the instant case presents issues of tremendous importance to the shipping public; (2) that the practical effect of the decision of the court below is to render Section 16(2) of the Interstate Commerce Act in large part a nullity; (3) that the decision and judgment below are erroneous as a matter of law.

As this court has had reason to observe on many occasions, one of the primary purposes of the Congress in passing the Interstate Commerce Act, and the amendments thereto, is to protect the members of the shipping public from unlawful abuses perpetrated by powerful, far-flung railroads on which shippers depend in such large measure for transportation service. Shippers are particularly at the mercy of arbitrary railroads in the matter of unlawful rates. Requiring the

transportation service to move their traffic, shippers must pay railroad freight invoices within 96 and 120 hours, under penalty of law.*

Congress has been very specific in affording shippers a feasible method, with minimum burden of expense, whereby they may obtain reparations. This was accomplished by the enactment of Section 16(2) of the Interstate Commerce Act, 49 U.S.C. 16(2), set forth in Appendix A hereof.

Congress clearly endeavored to counter-balance the scales when a shipper obtains a reparations order and the railroads decline or refuse to pay. For example, Congress conferred upon the shipper considerable flexibility as to the forum he can use. The shipper can sue in the U. S. District Court in which he resides, or in which is located the principal operating office of the railroad, or through which the road of the carrier runs. In its concern for shippers as they seek relief against powerful railroads Congress went even further. It also made available to the shipper the forum of any state court of general jurisdiction having jurisdiction of the parties. Further, the findings and order of the Commission are to be *prima facie* evidence of the facts therein stated. If the shipper ultimately prevails, under Section 16(2) Congress has also provided that the shipper shall be allowed a reasonable attorney's fee, to be taxed and collected as part of the suit.

These are substantial advantages intentionally and deliberately made available to shippers by the Congress under Section 16(2) of the Interstate Commerce Act. See *Meeker & Co.* v. *Lehigh Valley R. R.*, 236

* See 49 Code of Federal Regulations 142.1 b.

U. S. 412 (1915) at page 433; *Baldwin* v. *Milling Co.*, 307 U. S. 478 (1939) at pages 481-483.

By virtue of Section 16(2) shippers who have received a reparation award from the Commission, which the carriers can refuse to pay, have had a feasible avenue of relief of tremendous importance, especially when the award is a modest one or when the financial resources of the shipper to pursue litigation are limited regardless of the size of the reparation award.

In one fell swoop the decision of the court below would, in practical effect, eviscerate these protective provisions of Section 16(2) of the Interstate Commerce Act. Under that decision, the railroads are enabled to rush to a courthouse of their own selection and effectively prevent the shipper from taking steps under Section 16(2). In the very case now before this Court the effort of the shipper to avail itself of its remedy under Section 16(2) has thus far come to naught, and will come to naught if the decision below is allowed to stand.

Of what use are the remedies under Section 16(2) to a small shipper in New York if the railroads can institute suit in Florida attacking the reparation award the shipper obtained from the I.C.C., before the shipper even determines upon the forum he will use? Indeed, while the shipper is still hoping and expecting that the railroads will acquiesce in the I.C.C. reparation award, so that he is not even thinking of suing pursuant to Section 16(2), the railroad defendants can select the forum of maximum inconvenience to the shipper, bring suit against the I.C.C., not the shipper, and hope the shipper will abandon his claim, in view of the financial

expenditures such litigation will entail for the shipper. Under such circumstances the Section 16(2) remedy for shippers so carefully fashioned by Congress would become a snare and an illusion.

The loss to shippers of the substantial benefits of Section 16(2), under the interpretation of the court below, would be an unmitigated disaster for the shippers of the United States. They will be left to the whim of the powerful railroads, with their far-flung operations and sizeable legal staffs who will pick and choose the forums. One may be sure, such forums will involve maximum expense and inconvenience to shippers.

Such a result makes a mockery of the effort of Congress to delineate the manner in which orders awarding reparations to shippers shall come before the courts.

The court below relies upon 28 U. S. Code 1336, 1398, 2321 and Section 17(9) of the Interstate Commerce Act. These are set forth in Appendix A hereto. 28 U.S.C. 2321 explicitly contains the excluding words ". . . any order of the Interstate Commerce Commission other than for the payment of money . . ." 28 U.S.C. 1336 commences with the clause "Except as otherwise provided by Act of Congress . . . ." 28 U.S.C. 1398 expressly begins: "Except as otherwise provided by law . . ."

The League submits that the quoted excluding and excepting clauses refer to provisions such as Section 16(2). These clauses point necessarily to the opposite conclusion to that reached by the Court below. This is all the more so when, as we have seen, the interpretation of the Court below will render Section 16(2) a pious platitude and little more.

The reliance of the court below upon Section 17(9) of the Interstate Commerce Act is also without warrant. It has always been recognized by the Court that only an order which is "final" in nature is reviewable. *Missouri, Pacific & Express, Inc.* v. *United States,* 165 F. Supp. 677 (D.C. Ky. 1958); *Michigan Public Service Commission* v. *United States,* 162 F. Supp. 670 (D.C. Michigan 1958); *Carolina Scenic Stages* v. *United States,* 202 F. Supp. 919 (D.C. S.C. 1962); *Malone Freight Lines, Inc.* v. *United States,* 204 F. Supp. 745 (D.C. Alabama 1962); *AEC Lines, Inc.* v. *United States,* 197 F. Supp. 591 (D.C. Iowa 1960).

By the explicit terms of Section 16(2) a reparation order of the Interstate Commerce Commission is not such a final order. It is "prima facie evidence", and nothing more, by precise definition in the statute. Professor Sharfman, one of the leading authorities on the Interstate Commerce Act, in his monumental treatise, noted that a reparation order is ". . . not legally binding upon the carrier." See *Sharfman, Interstate Commerce Commission, a Study in Administrative Law and Procedure,* Part III-B, Page 330 (1936). The Commission's reparation order merely forms *prima facie* evidence of the matters therein stated at the separate court action. *Morgan Co.* v. *Great Northern Ry. Co.,* 285 Fed. 876, 878 (7th Circuit, 1923); *Meeker & Co.* v. *Lehigh Valley R. R.,* 236 U. S. 412, 439 (1915); *Mills* v. *Lehigh Valley R.R.,* 238 U. S. 473, 482 (1915); *Pennsylvania R.R.* v. *Jacoby & Co.,* 242 U. S. 89, 94 (1916); *Spiller* v. *A.T. & S. F. Ry.,* 253 U. S. 117, 131 (1920); *Pennsylvania R. R.* v. *Weber,* 257 U. S. 85, 90 (1921).

Orders of the Interstate Commerce Commission are not subject to judicial review if they do not command carriers to do or refrain from doing anything, grant or withhold any authority, privilege, or license, extend or enlarge any power or facility, subject carrier to any liability, civil or criminal, change carriers' existing or future status or condition, or determine any right or obligation. *Motor Freight Express, Inc.* v. *United States,* 60 F. Supp. 238 (D.C. Pennsylvania 1945). In the case at hand, the so-called "order" of the Commission did not subject the carrier to any civil or criminal liability or otherwise meet the foregoing requirements. While the order entered by the Commission "authorized and directed" the carrier to pay reparation to the shipper, such an order is not itself enforceable.

The court below makes much of "the statutory scheme" and "symmetry". The National Industrial Traffic League submits that the Congress in its wisdom enacted Section 16(2) for the protection of shippers in their up-hill, uneven struggle when in dispute with the powerful railroads of the nation. The decision of the court below will reduce the carefully constructed statutory scheme for the assistance of shippers to a shambles, and leave countless shippers throughout the country without an effective remedy for recovering, through reparations, freight rates and changes unlawfully exacted. Shippers and railroads have functioned well under the provisions of Section 16(2) for many decades with no serious disturbance to the "symmetry" mentioned by the court below. In effect the court below would repeal the protective provisions of Section 16(2) by judicial fiat, to the serious and substantial detriment of the shippers of this nation.

CONCLUSION

The National Industrial Traffic League as amicus curiae submits that the instant case involves issues of far-reaching importance to the shippers of the United States, and of vital significance to the administration of the Interstate Commerce Act. The decision of the court below is in flagrant conflict with the governing statutes and with the principles pertaining thereto promulgated by the federal courts, including this Court. It is urged that a writ of certiorari to review the judgment of the court below be granted.

Respectfully submitted,

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APPENDIX A

Relevant Portions of Statutes Involved

Section 16(2) of the Interstate Commerce Act, 49 U.S.C. § 16(2), provides:

> If a carrier does not comply with an order for the payment of money within the time limit in such order, the complainant, or any person for whose benefit such order was made, may file in the district court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the road of the carrier runs, or in any State court of general jurisdiction having jurisdiction of the parties, a complaint setting forth briefly the causes for which he claims damages, and the order of the Commission in the premises. Such suit in the district court of the United States shall proceed in all respects like other civil suits for damages, except that on the trial of such suit the findings and order of the Commission shall be prima facie evidence of the facts therein stated, and except that the plaintiff shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings unless they accrue upon his appeal. If the plaintiff shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit.

Section 17(9) of the Act, 49 U.S.C. § 17(9), provides:

> When an application for rehearing, reargument, or reconsideration of any decision, order, or requirement of a division, an individual Commissioner, or a board with respect to any matter assigned or referred to him or it shall have been made and shall have been denied, or after rehearing, reargument, or reconsideration otherwise disposed of, by the Commission or an appellate division, a suit to enforce, enjoin, suspend, or

set aside such decision, order, or requirement, in whole or in part, may be brought in a court of the United States under those provisions of law applicable in the case of suits to enforce, enjoin, suspend, or set aside orders of the Commission, but not otherwise.

Section 1336 of the Judicial Code, 28 U.S.C. § 1336, provides:

> Except as otherwise provided by Act of Congress, the district courts shall have jurisdiction of any civil action to enforce, enjoin, set aside, annul or suspend, in whole or in part, any order of the Interstate Commerce Commission.

Section 1398 of the Judicial Code, 28 U.S.C. § 1398, provides:

> Except as otherwise provided by law, any civil action to enforce, suspend or set aside in whole or in part an order of the Interstate Commerce Commission shall be brought only in the judicial district wherein is the residence or principal office of any of the parties bringing such action.

Section 2321 of the Judicial Code, 28 U.S.C.A. § 2321, provides:

> The procedure in the district courts in actions to enforce, suspend, enjoin, annul or set aside in whole or in part any order of the Interstate Commerce Commission other than for the payment of money or the collection of fines, penalties and forfeitures, shall be as provided in this chapter.
>
> The orders, writs, and process of the district courts, may, in the cases specified in this section and in the cases and proceedings under sections 20, 23 and 43 of Title 49, run, be served, and be returnable anywhere in the United States.